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RECENT DEVELOPMENTS IN THE WARSAW CONVENTION†

BY FREDERICK B. LACEY††

SINCE 1934, when the United States first adhered to the Warsaw Convention, that treaty has defined for us the scope of air carrier liability on inter-signatory nation flights. On and after 16 May 1966, most major airlines waived the Warsaw \$8,300 limitation of liability and accepted a \$75,000 limitation in its place. This change, as well as recent Warsaw Convention case law developments, is hereinafter discussed.

I. THE 1966 AGREEMENT

A. Background

The Warsaw Convention,¹ to which over ninety nations adhere, creates a virtual presumption of liability on the part of the air carrier,² but limits its liability to approximately \$8,300 (Article 22). To recover more, "wilful misconduct" must be demonstrated.³ The presumption of liability can be defeated if the airline proves it took all necessary measures to avoid the damage or that it was impossible to take such measures.⁴

The Department of State recently described the Convention as "one of the principal multilateral agreements applicable to international air transportation. It . . . creates a uniform body of law with regard to the rights and responsibilities of passengers, shippers, and air carriers in international transportation."⁵

† Reprinted with permission from the *Insurance Counsel Journal*, © 1967 by the International Association of Insurance Counsel.

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¹ The Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature 12 October 1929, 49 Stat. 3000, T.S. No. 876, L.N.T.S. 137:11. The Convention entered into force as a treaty on 13 February 1933, and was adhered to by the United States on 29 October 1934.

² Article 17 states: The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

³ Article 25 states: (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

⁴ Article 20(1) states: The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

⁵ Department of State, United States Government Action Concerning the Warsaw Convention, 5 May 1966. This paper has been reprinted in 32 J. AIR L. & COM. 243 (1966). Additionally, in a hearing before the Senate Foreign Relations Committee concerning the Hague Protocol, Leonard Meeker, Legal Adviser—Designate of the Department of State, said: "On the whole, the Depart-

B. *The Hague Protocol*

In 1955, at The Hague, following meetings sponsored by the International Civil Aviation Organization (ICAO), a Protocol was adopted which sought to amend Warsaw by better defining wilful misconduct and by increasing the dollar limitation to \$16,600.⁶ The Hague Protocol became effective 1 August 1963, where ratified. The United States has not ratified it.

Thus, two American courts have refused to apply the Protocol to actions brought in this country. *Kelley v. Societe Anonyme Belge D'Exploitation*⁷ involved a crash in Belgium in which, Belgium having ratified the Protocol, plaintiffs sought the \$16,600 limitation on liability rather than the Warsaw limitation. The court found Warsaw applicable:

The United States is not an adherent to the Hague Protocol—it is bound only by the Convention. Although the internal law of Belgium may now provide a higher limitation, it is not applicable. . . .

A similar result was reached in *Alexandre v. Eastern Airlines, Inc.*⁸

C. *United States Consideration Of The Hague Protocol*

While the United States signed the Protocol in 1956, it was not until 1959 that the Protocol was first submitted to the Senate, and it was not acted upon at that time.

In 1961, the Kennedy Administration, though the IGIA,⁹ undertook a broad study of Warsaw and the Hague Protocol. IGIA eventually recommended ratification to the Secretary of State, but coupled with legislation requiring the carrier to provide passengers with \$50,000 of insurance. This recommendation was forwarded to Congress in August, 1964,¹⁰ and,

ment of State believes the Warsaw Convention has been beneficial to air transport and air travelers. If we had no convention, many victims of air disasters would have great difficulty in pursuing effective remedies and securing prompt recoveries in the case of accidents occurring over the high seas or in foreign countries with laws different from our own." Hearings Before The Committee on Foreign Relations, Executive H., U. S. Senate, 86th Cong., 1st Sess., at 2, 26 May 1965.

⁶ Two excellent articles which review events from The Hague Conference to the 1966 Agreement are Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967); Stephen, *The Adequate Award in Aviation Accidents*, 1966 INS. L.J. 711. John F. Stephen is General Counsel of ATA (Air Transport Association of America). Andreas F. Lowenfeld and Allan I. Mendelsohn are attorneys who were in the Office of the Legal Adviser, Department of State, during the time leading up to and following the denunciation of Warsaw; Mr. Lowenfeld was Deputy Legal Adviser. Both men attended the 1966 Montreal Conference and Mr. Lowenfeld was chairman of the United States Delegation. While the opinions expressed in the Harvard article are those of the authors, it does appear that the article follows closely the various positions taken by the Department of State with respect to Warsaw. An article dealing with events leading up to the denunciation and written from the plaintiffs' point of view is Kreindler, *The Denunciation of The Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965). An article concerned primarily with an appraisal of the 1966 Agreement by a member of the plaintiffs' aviation bar is Sincoff, *Absolute Liability and Increased Damages in International Aviation Accidents*, 52 A.B.A.J. 1122 (1966).

⁷ 242 F. Supp. 129 (E.D.N.Y. 1965). Kelley is also discussed under III, *infra*.

⁸ 9 Av. Cas. ¶ 17,844 (W.D.N.Y. 1965).

⁹ IGIA (Interagency Group on International Aviation) was composed of representatives of those agencies and departments of the Government having an interest in international aviation affairs. The principal agencies and departments in IGIA were the Departments of State, Defense and Commerce, and the FAA and CAB.

¹⁰ In 1963, during the period of the IGIA study, the CAB issued a regulation to cover the question of notice of international passengers of the Warsaw limitation on liability. 14 C.F.R. § 221.175 (1967) provides in part:

(a) In addition to the aforesaid requirements of this subpart, each air carrier

no action having been taken thereon, was resubmitted in April, 1965.

On 26 and 27 May 1965, the Senate Foreign Relations Committee held two days of public hearings on the Protocol. Najeeb Halaby of the FAA, and State Department Legal Adviser, Leonard Meeker, supported ratification of the Hague Protocol and enactment of the insurance bill. Air Transport Association (ATA) President Stuart G. Tipton supported ratification of the Protocol but opposed the insurance legislation.

On 29 June 1965, the Foreign Relations Committee report recommended that the Senate give its advice and consent to the adoption of the Protocol. This recommendation, however, was tied to enactment of the insurance bill. The Committee further recommended that, "if insurance legislation similar to that which has been proposed by the administration is not enacted within a reasonable time (*i.e.*, prior to the adjournment of the 89th Congress), the Department of State should take immediate steps to denounce the Warsaw Convention and the Hague Protocol."

Congress, however, did not act on the insurance legislation. Consequently, in the summer of 1965, the administration concluded that the Protocol alone "would not afford adequate protection to the American traveling public. If no supplementary protection could be made available, then withdrawal from the Convention and reliance on the common law would afford the best measure of protection."¹¹ In August, 1965, the State Department suggested to ATA and representatives of several major airlines that the airlines themselves provide the "supplementary protection" by voluntarily increasing their limitation on liability under Warsaw from \$8,300 to \$100,000.¹² The suggestion was declined although the United States carriers indicated they would voluntarily waive Warsaw to \$50,000 provided that the principal foreign carriers would do the same.

D. *The Denunciation Of Warsaw*

By September, 1965, it had apparently become the administration's position that it "had no alternative to giving notice of denunciation."¹³ (Article

which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

Advice to International Passengers on Limitation of Liability

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately \$8,290 and limits liability for loss or damage to baggage.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

¹¹ Department of State, "United States Government Action Concerning the Warsaw Convention," 5 May 1966, note 5 *supra*.

¹² A detailed review of ATA's position on the events of 1965-1966 is found in Stephen, *The Adequate Award in Aviation Accidents*, note 6 *supra* while the State Department's position is reviewed in Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, note 6 *supra*.

¹³ Lowenfeld and Mendelsohn, *supra* note 6, at 549.

39 of the Convention provides that any High Contracting Party may denounce the treaty by so notifying the Polish Government; this denunciation takes effect six months after the notification of denunciation.) The center of Warsaw-Hague activities now shifted from the United States Congress to the councils of IATA and ICAO.¹⁴

On 15 November 1965, the United States formally denounced the Warsaw Convention by filing a notice of denunciation with the Polish Government. The administration stated that it would withdraw the denunciation prior to its effective date of 15 May 1966, if: (a) there was "a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of \$100,000 per passenger or on uniform rules but without any limit of liability;" and (b) there was an interim agreement among the principal international air carriers waiving the limits of liability up to \$75,000 per passenger.

At about the time of the denunciation, IATA had succeeded in having the principal international carriers agree to waive Warsaw to \$50,000 on all treaty traffic to and from the United States pending a new treaty provision. This IATA-sponsored agreement failed to meet the requirements of the State Department position and was not approved by the CAB.

Shortly before the denunciation, ICAO had scheduled an international conference to be held in February, 1966, in Montreal to seek a solution to the Warsaw problem. The meeting did not result in an agreement. Then, in March, 1966, the administration changed its position on the interim settlement of the problem. It adhered to the \$75,000 limitation but insisted that the carriers also accept absolute liability.¹⁵ In April and early May, 1966, largely thorough the efforts of IATA, the major international airlines entered into an agreement along the lines of the administration's March, 1966, proposal. On the basis of this interim agreement, the notice of denunciation was subsequently withdrawn by the United States. The crisis was over. The Warsaw Convention, although significantly altered, remained in effect.

E. The Agreement

While the interim agreement was drafted by representatives of the United States Government and various air carriers, the Government is not a party to the instrument. Unlike Warsaw and The Hague, to which nations are adhering parties, the 1966 Agreement (also called the Montreal Agreement) was entered into only by airlines. Approximately 80 airlines have now joined the Agreement.¹⁶

The Agreement provides that as to all international transportation by a participating carrier which includes the United States as a point of origin,

¹⁴ IATA (International Air Transport Association) is an international association of carriers. ICAO (International Civil Aviation Organization) is an intergovernmental body.

¹⁵ Lowenfeld and Mendelsohn suggest that the inclusion of the absolute liability arrangement was the "quid pro quo" for a United States retreat from anticipation of an agreement on a permanent arrangement for a \$100,000 ceiling. Lowenfeld and Mendelsohn, *supra* note 6, at 587.

¹⁶ The CAB has formally approved the 1966 Agreement. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Docket No. 17325, CAB Order No. E-23680, CAB Agreement No. 18900 (13 May 1966).

point of destination, or agreed stopping place, recovery for death or bodily injury shall not exceed \$75,000, inclusive of legal fees and costs.¹⁷ The Agreement further provides that the airline will not avail itself of any defense under Article 20(1) of Warsaw¹⁸ but that those guilty of sabotage and persons claiming on their behalf will not be entitled to recover any damages. The airline is also required under the Agreement to furnish to each Warsaw passenger, at the time of delivery of the ticket, a prescribed written notice advising the dollar limitation of Warsaw, Hague and the 1966 Agreement.¹⁹ Any carrier may withdraw from the Agreement by giving twelve months' written notice to the CAB.

The State Department has announced that the 1966 Agreement is an interim arrangement and that, "in the months ahead," public hearings will be held to determine the definitive United States position in preparation for further international discussions about Warsaw. The Department also characterized the 1966 Agreement as best serving "the interests of the United States traveling public and of international civil aviation."²⁰ Lowenfeld and Mendelsohn were more to the point in expressing this last thought when they wrote:

Essentially, then, the success of the arrangement will depend on the accuracy of the prediction that cases will be settled quickly and economically. It may well be that in the case of principal wage earners in the United States, claims will be handled like health or life insurance claims—with forms and perhaps interviews with the plaintiff and with the decedent's employer, but without any litigation. Where lawyers do participate, either to establish the proper claimant or to participate in the determination of the amount of damages, their task will be far simpler than at common law. They will not be required to have expertise either in conflict of laws or in the causes of air accidents, and with the issue of fault laid aside, there will be no risk of non-recovery.

¹⁷ In nations where provision is made for separate award of legal fees and costs, the limitation is \$58,000 exclusive of legal fees and costs.

¹⁸ Article 20(1), note 4 *supra*.

¹⁹ The notice must be printed in at least 10 point modern type and in ink contrasting with the stock on (a) the ticket, (b) the piece of paper either placed in the ticket envelope with the ticket or attached to the ticket or (c) on the ticket envelope. The notice is to read:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of (Name of Carrier) and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. \$75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U. S. \$8,290 or U. S. \$16,580.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

²⁰ Department of State Press Release No. 110 (13 May 1966). This document is reprinted in 32 J. AIR L. & COM. 247 (1966).

It would seem fair to assume that in these circumstances the cost of lawyers' will be drastically reduced.²¹

II. WILFUL MISCONDUCT

The *Berner* and *LeRoy* decisions in the Second Circuit and the *Berguido* decision in the Third Circuit are the most recent important cases in the "wilful misconduct"²² area. This has long been one of the most intensely litigated Warsaw Convention points.²³ Since the 1966 Agreement does not change the wilful misconduct rule, it is to be expected that this area will continue to be the subject of considerable litigation.

The wrongful death action brought on behalf of the noted pianist William Kapell was the subject of *Berner v. British Commonwealth Pacific Airlines, Ltd.*²⁴ At the trial of this case in 1961, the jury found for the airline on all issues. No damages were awarded. The plaintiffs moved for judgment *n.o.v.* or a new trial, and the trial court, after two years, set aside the jury verdict, found wilful misconduct as a matter of law, and ordered a new trial as to damages.²⁵ A verdict of \$924,396 was then returned at the trial on damages. The Court of Appeals reversed the action of the trial court, directed that judgment be entered upon the jury verdict in favor of the defendants, and held that the wilful misconduct questions depended

. . . upon inferences to be drawn from essentially circumstantial evidence. Those who alone could provide direct evidence as to what in fact led the pilot to act are, unfortunately, not able to do so. One can hardly imagine a clearer case in which such questions should have been left to the jury.²⁶

* * *

We do not mean to suggest that "wilful misconduct" is an entirely subjective matter, . . . but merely that we cannot know all the facts needed to make any kind of judgment, subjective or objective, as to what a man in the pilot's position should have done. The fragmentary reconstruction that can be made permits inferences other than wilful misconduct. That is enough to let a jury's verdict stand.²⁷

Of particular importance is the *Berner* statement that the trial court erred in holding that the Second Circuit, in wilful misconduct cases, does not require knowledge that damage would probably result. In this respect, the Court of Appeals pointed to its prior approval of the *Pekelis*²⁸ and

²¹ Lowenfeld and Mendelsohn, *supra* note 6, at 600-01.

²² Article 25(1), note 3 *supra*.

²³ Lee S. Kreindler, of the New York bar, was asked in a recent Senate hearing whether wilful misconduct could be proven. He replied: "Wilful misconduct is extremely difficult to prove, but we can prove it in some cases." Hearings Before The Committee On Foreign Relations, Executive H, U. S. Senate, 86th Cong., 1st Sess., at 65, 27 May 1965.

²⁴ 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966). The *Berner* action in New York had originally been instituted in the Supreme Court of that State. Service of the summons was upheld in *Berner v. United Airlines, Inc.*, 2 Misc. 2d 260, 149 N.Y.S.2d 335 (Sup. Ct.), *aff'd*, 3 App. Div.2d 9, 157 N.Y.S.2d 884 (1st Dept. 1965). Later, the defendants removed the case to the District Court for the Southern District of New York after the complaint had been served.

²⁵ The District Court opinion with its appendices is over 70 pages long. 219 F. Supp. 289 (S.D.N.Y. 1963).

²⁶ 346 F.2d at 538.

²⁷ *Id.* at n.4.

²⁸ *Pekelis v. T.W.A., Inc.*, 187 F.2d 122 (2d Cir. 1951), *cert. denied*, 341 U.S. 951 (1951).

*Grey*²⁹ jury charges. The *Pekelis* charge was that wilful misconduct is (1) the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or (2) the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences, or (3) the intentional omission of some act, with knowledge that such omission will probably result in damage or injury, or (4) the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission. The *Grey* charge was that wilful misconduct requires proof of a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty.

In *LeRoy v. Sabena Belgian World Airlines*,³⁰ the plaintiff broke Warsaw in a death case resulting from a crash in Italy and obtained a verdict of \$205,705.³¹ The court held there had been no error committed in refusing to charge the jury that "because of the human instinct of self-preservation and the disposition of men to avoid personal harm", the crew of the Sabena plane 'are presumed to have acted with diligence and due care'."

The 1966 *Berguido* decision was the Third Circuit's second opinion in that death action.³² The case involved the crash of a Constellation near the airport in Jacksonville, Florida. In affirming an \$8,300 judgment for plaintiff, the Court of Appeals held: "The initial observation of the District Court that the evidence as to causation was meager and incomplete would appear to have substantial support in the record."³³

The plaintiff had presented alternate theories of wilful misconduct. The first was that the pilot was attempting a "sneak-in" landing—dropping down through a low cloud ceiling into a position below the authorized ILS approach minimum elevation. This theory was advanced by plaintiff's experts in answers to hypothetical questions. The trial court disposed of

²⁹ *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955), cert. denied, 350 U.S. 989 (1956).

³⁰ 344 F.2d 266 (2d Cir. 1965), cert. denied, 382 U.S. 878 (1965).

³¹ In a 1966 death case in the New York Supreme Court involving a crash near Shannon Airport, seven plaintiffs broke Warsaw and obtained a verdict in the sum of \$315,000. In denying the airline's post-trial motions, the trial court held: "The determination of wilful misconduct does not require a single act of horror but may be based upon the cumulative effect of numerous departures from required standards on the part of the defendant or any of its officers, agents or employees." *Reiner v. Alitalia Airlines*, 9 Av. Cas. ¶ 18,228 (N.Y. Sup. Ct. 1966).

³² *Berguido v. Eastern Air Lines, Inc.*, 369 F.2d 874, 9 Av. Cas. ¶ 18,319 (3d Cir. 1966). The first appeal, which reversed a \$454,658 verdict, is reported at 317 F.2d 628, rehearing denied, 317 F.2d 633 (3d Cir. 1963), cert. denied, 375 U.S. 895 (1963). In all, the *Berguido* case has been tried five times. The first two trials resulted in mistrials, while the third trial resulted in the verdict upset on the first appeal. The fourth trial produced a verdict for the plaintiff in the limited amount of \$8,300, the jury having resolved the wilful misconduct issue adversely to the plaintiff. The District Court vacated this judgment and granted a new trial. 35 F.R.D. 200 (E.D. Pa. 1964). The fifth trial was then held. The parties waived a jury. At the conclusion of the trial, the court entered judgment against the defendant for \$8,300. It was this judgment which was affirmed on the second *Berguido* appeal.

³³ The Court of Appeals stated that the District Court had noted "that a considerable number and variety of causes of the accident were within the realm of possibility. The District Court observed further that in a case such as this, where the search is for the cause of the accident, the judgment of a court must be determined upon the probabilities insofar as they can be determined from the evidence, and not on a mere possibility, even if such possibility be disclosed by the evidence." 369 F.2d 874, 876, 9 Av. Cas. ¶ 18,321 (3d Cir. 1966).

the "sneak-in" theory by first holding that all the assumed facts stated in the hypotheticals were not proven by the preponderance of the evidence. Additionally, even if the assumed facts were taken to be proven, the trial court found that the conclusions reached by the experts were not believable. The Court of Appeals held that this disposition of the "sneak-in" theory was that both pilot and copilot had submarginal heart conditions. *pertise*, was well within its province as fact finder." The plaintiff's second theory was that both pilot and co-pilot had submarginal heart conditions. The trial court refused to draw an inference from these medical deficiencies that a triggering of known physical disabilities was the cause of the crash. The appellate court held that the trial court had the right to refuse to draw that inference, observing that there was no other evidence introduced to show either a physical malfunction of the pilot or copilot or that such a malfunction was the probable cause of the accident.

In addition to arguing wilful misconduct, plaintiff theorized that most courts have been laboring under a misconception about the scheme of the Warsaw Convention. Plaintiff claimed that the airline has "unlimited absolute liability" under Article 17³⁴ if it fails to carry the burden of proving that it has complied with Article 3(1).³⁵ Specifically, the plaintiff urged that the airline failed to prove either delivery of the ticket to the decedent or delivery of an "adequate" ticket showing (1) all agreed stopping places and (2) the provisions of the Convention which limit a carrier's liability. The airline countered these arguments by arguing, among other things, that plaintiff has the burden of proving non-compliance with Article 3(1). The Court of Appeals rejected the plaintiff's argument that the Convention meant to establish "unlimited absolute liability" by stating that Judge McLaughlin in the first *Berguido* appeal

. . . in effect disposed of it by appropriately reading Articles 17 and 22(1) [the \$8,300 limitation] *in pari materia*. It was thus stated:

" . . . The Warsaw Convention provides, *inter alia*, that the carrier is absolutely liable for all injuries where the accident causing the damage so sustained took place on board the aircraft. Article 17. In such circumstances, the liability of the carrier for each passenger is limited to 125,000 francs (approximately \$8,300). Article 22(1). . . ."

Article 17 itself gives no indication of the extent of a carrier's liability. It must be read with Article 22(1) for the question concerning the extent of the liability to be answered, and an analysis of the question does not support absolute *unlimited* liability as the scheme of the Convention.³⁶

³⁴ Article 17, note 2, *supra*.

³⁵ Article 3(1) provides: For the transportation of passengers, the carrier must deliver a passenger ticket which shall contain the following particulars:

- (a) The place and date of issue;
- (b) The place of departure and of destination;
- (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises right, the alteration shall not have the effect of depriving the transportation of its international character;
- (d) The name and address of the carrier or carriers;
- (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

For a discussion of other Article 3 cases, see III, *infra*.

³⁶ *Berguido*, *supra* note 32, at ¶ 18,322-23.

The Court did not have to rule on plaintiff's other Article 3 (1) arguments since it upheld the District Court's ruling that the airline was not even negligent; consideration of these other points thus became moot.

These recent cases all indicate that the *Pekelis* and *Grey* interpretations of wilful misconduct appear to be firmly settled in the Second and Third Circuits.³⁷ Wilful misconduct, so defined, will probably remain an area of active litigation in those cases in which plaintiffs or their representatives have reason to believe that collectible damages can exceed \$75,000.

III. THE TICKET AS AFFECTING THE AVAILABILITY OF THE WARSAW CONVENTION DEFENSE; "PROCEDURAL" DEFENSES

Several recent decisions have examined the circumstances surrounding the delivery of the airplane ticket and the wording found on the ticket as these factors affect the availability of the treaty defense. These cases turn in large part on Article 3 of the Convention.

In a 1965 death case, the Second Circuit found, as a matter of law, that the delivery of the airplane ticket to plaintiffs' decedent "was not adequate and that the limitation on damages of the Convention is [thus] in applicable."³⁸ The flight had been chartered³⁹ by the United States to transport military personnel and cargo to military destinations outside the continental United States. Mertens' tickets was not delivered to him until after he had boarded the plane and after the material he was accompanying under military orders had already been loaded on the plane. Mertens was a military courier and would have disobeyed orders if he had left the plane to purchase flight insurance. Additionally, at the time Mertens' ticket was given to him, the plane was parked on the ramp ready to take off. The court noted that the ticket's "statement concerning the limitation of liability was printed in such a manner as to virtually be both unnoticeable and unreadable, especially in an aircraft about to take off."

The court held that Article 3 (2)⁴⁰ requires that the ticket be delivered to the passenger "in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability." These measures could include deciding not to take the flight, making a special contract with the airline, or taking out flight insurance. The determination of whether the ticket has been delivered in such a manner as to afford the passenger a "reasonable opportunity" to take self-protec-

³⁷ Two interesting wilful misconduct cases from foreign jurisdictions are *Horabin v. British Overseas Airways Corp.*, 1952 U.S. & Can. Av. 549 (Queens Bench 1952), which contains the charge to the jury, and *Pauwels v. Sabena*, 1950 U.S. Av. 367 (Kingdom of Belgium, Court of Brussels, 1950), an opinion which held there was no wilful misconduct. Wilful misconduct has been reviewed: See Note, *Warsaw Convention—Article 25—"Wilful Misconduct,"* 32 J. AIR L. & COM. 291 (1966).

³⁸ *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 856 (2d Cir. 1965), cert. denied, 382 U.S. 816 (1965).

³⁹ The charter flight aspects of the *Mertens* case are discussed under IV, *infra*.

⁴⁰ Article 3 (2) provides: The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered, he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability. Article 3 (1) has been quoted at note 30, *supra*.

tive measures depends on the facts of each case. However, under all the circumstances outlined above, the court determined that "it could not be said" that Mertens did have a "reasonable opportunity" in this case. The judgment for approximately \$8,300 was vacated and the case was remanded for a new trial on damages.⁴¹

The Ninth Circuit has announced that it is "in complete accord" with the *Mertens* approach to Article 3(2).⁴² This decision involved a 1962 flight chartered by the Government to transport American servicemen from the United States to Vietnam. The plane disappeared between Guam and Manila. The actions against the airline were brought under the Death on the High Seas Act.

The *Warren* passengers were not given any tickets by the carrier (apparently these had only been denominated "Boarding Tickets" by the airline) until they reached the foot of the ramp leading into the plane. Once these tickets were received, the servicemen were required to board the plane immediately. No opportunity was afforded them at that time to read the boarding ticket or to return to the terminal to purchase insurance. Relying upon the *Mertens* rationale, the court held that none of the passengers were afforded a "reasonable opportunity" of even reading the ticket, much less of obtaining insurance before they were accepted for boarding. "The passengers were thereby deprived of a right which was intended to be afforded them as a concomitant to the carrier's right to limit its liability."

Warren made clear that the rule of the case was not without limitations:

Nor were these passengers in any way responsible for this loss of right (of self-protection), as might be the case where a passenger arrives too late to late to read his ticket before boarding, or accepts standby status which requires him to board on short notice. . . . Had they been issued passenger tickets in the terminal, carrying notice of the Warsaw Convention limitation of liability, they would have had ample time to obtain additional insurance.⁴³

In a recent decision, the Second Circuit, by a 2-1 vote, took a step beyond *Mertens*. The court affirmed a partial summary judgment dismissing the airline's affirmative Warsaw defenses in a case essentially involving only the wording of the ticket.⁴⁴ The case dealt with consolidated death actions and property damage suits. The plaintiffs argued that Warsaw was not available as a defense because the airline had not "properly" notified the passengers of the applicability of the Convention.

The court reviewed the *Mertens* "reasonable opportunity" principle, as

⁴¹ In remanding the case, the court held: "Nothing in this opinion should be interpreted as necessarily implying that because the limitation of damages of the Convention is inapplicable, there can be no limitation upon the damages plaintiffs may be entitled to. Conceivably, a concerned jurisdiction might, quite independently of the Convention, impose a limitation on the amount of damages recoverable for a wrongful death; and then the question would have to be faced whether the limitation on damages by the Convention is the exclusive limitation on damages for death caused by the crash of an aircraft during a flight covered by the Convention . . . However, apparently none of the jurisdictions that might possibly be concerned with this issue have rules limiting the amount of the recovery, and there is thus no need to resolve that question now." 341 F.2d 851, 858 (2d Cir. 1965).

⁴² *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494, 498 (9th Cir. 1965). The charter flight aspect of this case is discussed under IV, *infra*.

⁴³ *Id.* at 498.

⁴⁴ *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508, 9 Av. Cas. ¶ 18,374 (2d Cir. 1966).

well as the similar approach in *Warren*, and held that the theory of those two decisions "is opposite to the case now before us." The court reasoned that the *quid pro quo* for the airline's limitation on liability "is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially." Thus the passenger has the opportunity to purchase insurance or take such other self-protective steps as he sees fit. The court accented an American passenger's point of view:

This notice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights, for which the Convention's restrictions on liability are inapplicable. It is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have frequently traveled domestically, the amount they may recover in the event of an accident is drastically reduced.

The *Lisi* majority concluded that the airline tickets and baggage checks in that case⁴⁵ did not raise a question of fact as to whether they gave the required notice. The Court of Appeals adopted the District Court's characterization of the notice on the ticket as "camouflaged in Lilliputian print in a ticket of 'Conditions of Contract'," "virtually invisible," "ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color or anything else," and that "the simple truth is that their presence is concealed."

In a pointed dissent in *Lisi*, Judge Moore described the majority opinion as "judicial treaty-making" and stated:

Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice.

He also said of the "notice" requirement:

Were actual notice to be the requirement, every airline would have to have its agents explain to every passenger the legal effect of the treaty and, in all probability, insist that each passenger be represented by counsel who could certify that he had explained the import of the Convention to his client who, in turn, both understood and agreed to the limitation.

In a baggage loss case, the First Circuit has reached a result contrary to *Lisi*.⁴⁶ The plaintiff had checked his baggage with the airline in Bombay where he received baggage claim tags. The baggage later disappeared and was never recovered. The passenger ticket stated:

Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (here-

⁴⁵ A replica of the *Lisi* ticket appears in the District Court opinion, 253 F. Supp. 237, 240-42 (S.D.N.Y. 1966).

⁴⁶ *Seth v. British Overseas Airway Corp.*, 329 F.2d 302 (1st Cir. 1964), *cert. denied*, 379 U.S. 858 (1964).

inafter called "the Convention"), unless such carriage is not "international carriage" as defined by the Convention.

The passenger argued that this notice failed to constitute compliance with Article 4(3)(h) which requires the baggage check to contain "a statement that the transportation is subject to the rules relating to liability established by this convention."⁴⁷ Specifically the plaintiff claimed that "considered as a whole the statement on the ticket does not categorically inform the passenger that his transportation is subject to the Convention."

The court rejected this argument and held:

The statement on the ticket quoted above gives the passenger clear notice that limitations on the carrier's liability for the loss of checked baggage are provided by the Warsaw Convention and that carrier will avail itself of those limitations if it can. The ticket does not leave the passenger in the dark as to a hidden risk he might not appreciate. It gives him fair warning of the existence of limitations on the carrier's liability which he can avoid only on showing that the carriage undertaken by the carrier is not "international carriage" as defined in the Warsaw Convention. This gives the passenger blunt warning to find out the nature of his carriage and if covered by the Warsaw Convention to declare excess value and pay the price for increased liability in the event his baggage is lost. We think this constitutes compliance with sub-paragraph (h) of Article 4 of the Warsaw Convention.

It appears that *Seth* and *Lisi* are not easily reconcilable, if at all. *Lisi*, in fact, specifically suggests that it is not in accord with *Seth*.⁴⁸

Another interesting recent decision which dealt with the "procedural" aspects of Warsaw is *Kelley v. Societe Anonyme Belge D'Exploitation*.⁴⁹ These consolidated death actions involved a 1961 Sabena crash near the Brussels Airport. The thrust of the plaintiffs' attempt to avoid Warsaw was the argument that, because Belgium made an "unauthorized reservation" to the Convention in its ratification of it in 1936, that nation never "effectively" ratified the treaty and was therefore not bound by it at the time of the crash. The court, however, held that the Convention was applicable and that the airline's liability must be determined in accordance with its terms.

Both Houses of the Belgian legislature, in passing a Law of April 7, 1936, approved the treaty, made it applicable to internal air transportation inside Belgium as well, and converted the Convention monetary standard into its equivalent in Belgian francs (the Convention speaks in terms of French francs). Shortly thereafter, Belgium deposited a written instrument with the Polish Government, pursuant to Article 37 of the treaty, approving and ratifying the Convention. This instrument was signed by King Leopold III. The plaintiff argued that the April 7 Law,

⁴⁷ This clause relates to the baggage check and is identical to the passenger ticket clause found in Article 3(1). Article 3(1) is quoted at note 30 *supra*.

⁴⁸ A New York state court has followed the *Seth* case. In *Manufacturers Hanover Trust Co. v. American Airlines, Inc.*, 43 Misc.2d 856, 252 N.Y.S.2d 517, 259 N.Y.S.2d 277, 9 Av. Cas. ¶ 17,633 (N.Y. Sup. Ct., App. Div. 1965), the Appellate Division reversed a lower court ruling dismissing the airline's limitation of liability defenses based on the Warsaw Convention. Citing *Seth* the appellate court held: "The tickets which were issued to the decedents make sufficient reference to the applicability of the convention."

⁴⁹ *Kelley*, *supra* note 7.

not the document deposited in Warsaw, was the instrument of ratification and that the April 7 Law was invalid because a subsequent devaluation of the Belgian franc would, by the terms of the Law, limit plaintiffs to a \$5,000 recovery instead of the Convention's \$8,300. The court held that the Law was not the ratification of the Convention. It had never been deposited with the Polish Government as was required for instruments of ratification; the document signed by the King, which was deposited,⁵⁰ made no mention of the 1936 Law; the Polish Government, pursuant to the Convention, notified the United States Government in 1936 that the Belgian "instrument of ratification," the document signed by the King, had been deposited in Warsaw.

Having disposed of the argument that the April 7 Law was neither a ratification nor a ratification with a reservation, the court touched on two further points. The first was whether the April 7 Law, "as a prior, inconsistent legislative enactment," divested the King of authority to sign the instrument of ratification which was deposited in Warsaw. The court concluded that this point was beyond judicial cognizance in this country—the courts are without power to determine whether a foreign head of state who entered into a treaty with the United States was empowered by the laws of his nation to do so. The second point was whether the passage and application of the April 7 Law constituted a breach of the Convention. The court did not pass on the merits of this point stating, "It is not within the power of this court to declare that Belgium has breached the Convention, thereby releasing the courts of the United States from the observance thereof."

IV. CHARTER FLIGHTS

Recent federal decisions have held that claims brought on behalf of military or civilian charter flight passengers in international transportation are subject to the Warsaw Convention.

*Mertens v. Flying Tiger Line, Inc.*⁵¹ appears to have been the first federal appellate decision on Warsaw and military charter flights.⁵² The flight originated at Travis Air Force Base in California; its point of destination was Tachikawa Air Force Base in Japan. The plane had been chartered by the United States to transport military personnel and cargo. The crash occurred in Japan.

The plaintiffs based their claim that the Convention did not apply to this charter flight on the ground that this Nation had adopted Warsaw

⁵⁰ There was some discussion about which documents had been physically deposited in Warsaw. The originals were destroyed during the Second World War. Plaintiffs argued that a copy of the 1936 Law was included among the deposited documents but the court rejected this claim as "conjecture." In deciding this point, the court referred in part to a copy of the document signed by the King, as certified by the Belgian Minister of Foreign Affairs, P. H. Spaak, and to a covering letter from Spaak which stated that "the only difference" between the certified copy and the original was that the original contained the text of the Convention. There was no credible evidence that the 1936 Law was ever deposited in Warsaw.

⁵¹ *Mertens*, *supra* note 38. *Mertens* is also discussed under III, *supra*.

⁵² In a 1959 decision involving a substantial freight loss which occurred while the plane was under a "Charter Agreement" between the airline and the United States Government, the Court of Claims said: "There is no serious question as to the applicability, in general, of the Warsaw Convention to the transportation involved in this case." *Flying Tiger Lines, Inc. v. United States*, 170 F. Supp. 422, 423 (Ct. Cl. 1959).

subject to the Additional Protocol that the Convention was not to apply to transportation "performed by the United States." Plaintiffs argued that because the aircraft "was regularly and in this instance chartered by the United States," the transportation was actually performed by the Government, thus making the Convention inapplicable. The Court of Appeals, however, held that the transportation was performed *by* the airline, the owner and operator of the aircraft, *for* the United States, and not *by* the United States. The court further held that any doubts about who actually was performing the transportation (because of the regularity of the chartering) were "dispelled by the negotiations surrounding the adoption of the Hague Protocol of 1955." The opinion states:

A draft protocol was prepared by the Legal Committee of the International Civil Aviation Organization at Rio de Janeiro in September 1953 and was submitted to the Hague Conference in September 1955. It sought to amend Article 2 of the Convention to read: "The Convention shall not apply to * * * [c]arriage of persons, cargo and baggage for military authorities by aircraft the whole capacity of which has been reserved by such authorities." The natural inference from this effort to amend the Convention is that without such an amendment the Convention would be applicable to such flights, or at least those proposing the amendment thought so. The proposed amendment was rejected by the Conference, though not because the representatives thought this exclusion was already provided for in Article 2. Instead, the representatives thought it more appropriate to let each individual Contracting Party, if it so chose, to make the Convention inapplicable to flights chartered by the military. Accordingly, a nation adhering to the Protocol was granted the legal power to declare that the Convention shall not apply to military charter flights on aircraft registered in that country, Article XXVI, Hague Protocol (Protocol Amending Convention for the Unification of Certain Rules to International Carriage by Air, The Hague, September 28, 1955), S. Doc. No Executive H., 86th Cong., 1st Sess. The United States has not yet ratified the Hague Protocol and obviously has not made the requisite declaration under that Protocol. The unavoidable conclusion is that the Warsaw Convention, as it is presently binding on the United States, is applicable to the flight in this suit.⁵³

Warren v. Flying Tiger Line, Inc.,⁵⁴ a consolidation of several death cases, was another military charter flight case which reached the same result as did *Mertens*.⁵⁵ The opinion assumes that the Convention applies notwithstanding the fact that the flight was a charter.⁵⁶ In an opinion which obviously involved the remand of some of the *Warren* death cases, the District Court explicitly held that the Warsaw Convention governed the cases and that the flight was *not* performed *by* the United States. The District Court was careful to point out that, "for the reasons stated in *Mertens* . . . , equally applicable here, the Convention applies."⁵⁷

⁵³ *Mertens*, *supra* note 38, at 854.

⁵⁴ *Warren*, *supra* note 42.

⁵⁵ *Warren*, like *Mertens*, is discussed in III, *supra*. Both cases deprived the airline of the benefit of the Convention limitation on liability for failure to make an adequate delivery of the ticket within the meaning of Article 3.

⁵⁶ The District Court opinion, 234 F. Supp. 223 (S.D. Cal. 1964), which was reversed on other grounds, advances approximately the same Hague Protocol argument later found in *Mertens* to support the inclusion of military charter flights within Warsaw.

⁵⁷ *Glassman v. The Flying Tiger Line, Inc.*, 9 Av. Cas. ¶ 18,295 (N.D. Cal. 1966).

The 1962 tragedy near Orly Field, Paris, involving the members of the Atlanta Art Association was the subject of a civilian charter flight case.⁵⁸ The Association had entered into an International Charter Flight Agreement with Air France to furnish a jet liner for an Atlanta to Paris round-trip flight. The form of the Agreement, which the court found included a provision "clearly declaring that the Warsaw Convention applied," was prescribed and approved by the C.A.B. Flight tickets were delivered to the passengers. These tickets "contained all the necessary particulars specified in Article 3 of the Convention" and created a "contract of carriage" between the passengers and the airline.⁵⁹

The plaintiffs argued that Warsaw did not apply to charter flights. The District Court held otherwise, placing particular emphasis on the fact that the Convention itself states that it applies to "any" and "all"⁶⁰ international transportation for hire between the High Contracting Parties. The court found that none of the three specific Convention exceptions⁶¹ to "any" and "all" international transportation applied and held:

[U]nder the factual situation in the cases at hand, where the Atlanta Art Association chartered an aircraft from Air France for the carriage of passengers on a specific flight from the United States, a High Contracting Party to the Warsaw Convention, to France, another High Contracting Party to the Warsaw Convention, with return to the United States; where Air France, the air carrier, owns, operates, and controls the aircraft and, prior to departure, delivers proper tickets to the passengers for their passage, the Warsaw Convention would be entitled to the presumption of liability contained in the Warsaw Convention as against Air France, and Air France, the air carrier, would be entitled to the limitation of liability also contained in the Convention as against the passengers.⁶²

The court also concluded that the language of the Convention was not ambiguous and thus it was "unnecessary to resort to a discussion of the legislative history of the Treaty." It is this "legislative history" point that is most heavily relied upon by the passengers on the pending Fifth Circuit appeal.

V. TWO-YEAR LIMITATION WITHIN WHICH TO SUE

Article 29 of the Convention provides that the right to damages shall

⁵⁸ *Block v. Compagnie National Air France*, 229 F. Supp. 801 (N.D. Ga. 1964). *Block* is presently on appeal in the Fifth Circuit.

⁵⁹ *Id.* at 807-08. With respect to the role of the Atlanta Art Association, the Court held: "No direct contract between the parties [passengers and airline] is required. No overt consent to be bound, other than travel on the ticket, is required. The presence of third parties, such as Atlanta Art Association, is immaterial. The Warsaw Convention applies." *Block*, *supra* note 58, at 809.

⁶⁰ Article 1 states: (1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. . . .

(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, . . . are situated . . . within the territories of two High Contracting Parties. . . .

⁶¹ The three exceptions are: (1) damage to mail (Article 2); (2) transportation performed by the United States (49 Stat. 3013); (3) transportation by way of experimental trial with the view to establishing regular lines of air navigation and transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business (Article 34).

⁶² *Block*, *supra* note 58, at 809.

be extinguished if an action is not brought within two years. In three cases since 1962, the courts have sustained the validity of this limitation.

A federal court in Illinois dismissed a wrongful death action which was commenced within two years of the decedent's death but more than two years after the alleged negligent occurrence.⁶³ The court held that the two-year limitation is operable "whether the cause of action is based on negligent conduct, wilful and wanton misconduct, or otherwise."

In an action for damages incurred because of an alleged untimely delivery of goods, summary judgment was granted for the airline and its shipping agent when suit was commenced more than two years from accrual.⁶⁴ The relief requested by the defendants was given despite plaintiff's contention of lack of knowledge of the conditions of the airway bills constituting the contract which included the time limitation.

A suit commenced two and one-half years after a delay which was said to have aggravated plaintiff's "pre-existing nervous and mental condition" was dismissed in *Sackos v. Compagnie Nationale Air France*.⁶⁵ The court held that the two-year conditions "are binding and have long been upheld by our courts." Plaintiff's claim that the two-year period should be tolled because she was suffering from mental illness for more than six months was not sustained. The court reasoned that the two-year period was a condition precedent⁶⁶ to bringing suit, rather than a statute of limitations, and thus cannot be tolled by a disability.

VI. "CONSTITUTIONALITY" OF THE WARSAW CONVENTION

Two recent attempts to challenge the constitutionality of the Warsaw Convention have been turned back on procedural grounds.⁶⁷

In *Boryk v. Aerolineas Argentinas*,⁶⁸ the plaintiffs applied for the convening of a three-judge court, under 28 U.S.C. 2282, "to determine, in essence, the constitutionality of the Warsaw Convention." Judge Bryan denied the application on two grounds: (1) a three-judge court can only enjoin the operation of Acts of Congress, not pass on the constitutionality of treaties; (2) to permit an equitable action to be entertained, in lieu of proceeding with orderly civil litigation, would be "unprecedented," "wholly unsound," and "subversive of the normal processes of civil justice."

In *Rieger v. Pan American World Airways*,⁶⁹ the District Court dismissed a declaratory judgment which sought: (1) to have the Warsaw Convention declared "void, invalid, unenforceable and repugnant to the

⁶³ *Bapes v. Trans World Airlines*, 209 F. Supp. 380 (N.D. Ill. 1962).

⁶⁴ *S. D. Tehrani & Co. v. KLM-Royal Dutch Airlines*, 9 Av. Cas. ¶ 17,344 (N.Y. Sup. Ct. 1964).

⁶⁵ 9 Av. Cas. ¶ 17,673 (N.Y. Sup. Ct. 1965).

⁶⁶ *Egan v. Kollsman Instrument Corp.*, 9 Av. Cas. ¶ 17,280 (N.Y. Sup. Ct. 1964) held that the two-year provision was not a condition precedent.

⁶⁷ In *Pierre v. Eastern Air Lines, Inc.*, 152 F. Supp. 486 (D.N.J. 1957), the District Court held that Warsaw's limitation of liability does not conflict with the Seventh Amendment right to trial by jury.

⁶⁸ 9 Av. Cas. ¶ 17,273 (S.D.N.Y. 1964).

⁶⁹ 9 Av. Cas. ¶ 18,093 (S.D.N.Y. 1966).

Constitution;" and (2) to have the airline enjoined from seeking to enforce the Convention as a defense in a wrongful death action in the New York Supreme Court. The court refused to exercise jurisdiction holding that the issue could be litigated in the state court and that "to allow plaintiff to proceed with this [declaratory judgment] action would only fragment and disrupt the litigation he has brought in the state court."

VII. CONCLUSION

If the State Department has correctly analyzed the Warsaw-Hague problem, the next few years should see a substantial decline in personal injury and death actions growing out of international flights. Time alone will tell. Meanwhile important Warsaw issues which arose before the adoption of the 1966 Agreement are still being litigated. Further case law can be expected in this area.